

## DEPARTMENT OF STATE REVENUE

04-20140079.LOF

**Letter of Findings Number: 04-20140079**  
**Sales and Use Tax**  
**For Tax Years 2010, 2011, and 2012**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

**ISSUES****I. Sales Tax - Liability.**

**Authority:** IC § 6-2.5-3-7; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Taxpayer protests the imposition of sales tax.

**II. Use Tax - Liability.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-2.5-1-1(a); IC § 6-2.5-1-2; IC § 6-2.5-1-5(a); IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-3-3; IC § 6-2.5-3-6(b); IC § 6-2.5-4-1; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoads v. Indiana Dept. of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dept. of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Ind. Dept. of State Revenue v. AOL, 963 N.E.2d 498 (Ind. 2012); [45 IAC 2.2-2-1](#); [45 IAC 2.2-3-4](#); Sales Tax Information Bulletin 54 (August 1990).

Taxpayer protests the imposition of use tax on the purchase of promotional materials.

**STATEMENT OF FACTS**

Taxpayer is a corporation. The Indiana Department of Revenue ("Department") audited Taxpayer. Taxpayer was unable to provide appropriate exemption certificates for certain transactions during the audit. Additionally, Taxpayer contracted with a vendor ("Vendor") to print and distribute promotional materials to Indiana recipients in close proximity to Taxpayer's physical location. Taxpayer did not pay sales or use tax on the purchase price of the promotional materials. The Department proposed an assessment of (1) sales tax and interest on certain retail transactions for which an exemption certificate was not provided and (2) use tax and interest on the purchase price of the promotional materials. Taxpayer protests the proposed assessment of additional tax. An administrative hearing was held, and this Letter of Findings results. Additional facts will be supplied as necessary.

**I. Sales Tax - Liability.****DISCUSSION**

Taxpayer protests the Department's proposed assessment of additional sales tax. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). The issue before the Department is whether Taxpayer met its burden to prove the Department's assessment is incorrect.

"A retail merchant is not required to produce evidence of nontaxability . . . if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax." IC § 6-2.5-3-7. Taxpayer has provided the Department with additional exemption certificates. Taxpayer's protest of the proposed assessment of additional sales tax is sustained subject to a supplemental audit review of the additional exemption certificates provided.

**FINDING**

Taxpayer's protest is sustained subject to a supplemental audit review of the additional exemption certificates

provided.

## II. Use Tax - Liability.

### DISCUSSION

Taxpayer protests the assessment of use tax on the purchase price of promotional material. All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). The issue before the Department is whether Taxpayer met its burden to prove the Department's assessment is incorrect.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). Indiana imposes a complementary use tax on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction" regardless of the merchant's or transaction's location. IC § 6-2.5-3-2(a); [45 IAC 2.2-3-4](#). The use tax is "functionally equivalent to [the] sales tax." *Rhoades v. Indiana Dept. of State Revenue*, 774 N.E.2d 1044, 1047-48 (Ind. Tax Ct. 2002). "Indeed, the purpose of the use tax is merely to prevent evasion of the sales tax." *Ind. Dept. of State Revenue v. AOL*, 963 N.E.2d 498, 501 (Ind. 2012).

The sales and use taxes apply only to retail transactions. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2. Selling at retail means a retail merchant "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration" in the ordinary course of the merchant's business. IC § 6-2.5-4-1. Tangible personal property is personal property that "can be seen, weighed, measured, felt, or touched . . . ." IC § 6-2.5-1-27.

Transactions that include tangible personal property and services "which are furnished under a single order or agreement and for which a total combined charge or price is calculated" are retail unitary transactions. IC § 6-2.5-1-1(a). The use tax on retail unitary transactions is "measured by the gross retail income received." IC § 6-2.5-3-3. The gross retail income received is the total value of the purchase price without deductions for, among others, "(1) the seller's cost of the property sold; (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (4) delivery charges . . . ." IC § 6-2.5-1-5(a). Therefore, the use tax due on a retail unitary transaction is based on the total purchase price.

Additionally, for a retail transaction, including a unitary transaction, to be subject to use tax, the tangible personal property must be "used, stored, or otherwise consumed" in Indiana. [45 IAC 2.2-3-4](#). For the purposes of Indiana use tax, "[u]se" means the exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The Indiana Tax Court has recognized that "[t]his is a broad definition" and that "[a]lmost any act not otherwise exempt will constitute a taxable use." *USAir, Inc. v. Indiana Dept. of State Revenue*, 623 N.E.2d 466, 469 (Ind. Tax Ct. 1993). This includes having promotional materials mailed to Indiana recipients. *AOL*, 963 N.E.2d at 504; Sales Tax Information Bulletin 54 (August 1990), <http://www.in.gov/dor/reference/files/sib54.pdf> (last visited June 20, 2014).

The person who acquires property in a retail transaction or who uses, stores, or consumes property acquired in a retail transaction in Indiana is responsible for payment of use tax on the transaction. IC § 6-2.5-3-6(b).

Here, Taxpayer purchased promotional materials to be mailed to Indiana recipients. Taxpayer provided the Department with copies of the Vendor's invoices. Taxpayer provided a letter from Vendor which indicates that its "advertising fees are made up of multiple cost[s]" which are not itemized on the invoice, including taxes and postage. These costs were not itemized on the invoices. In fact, one price was given for the combined order of tangible personal property and services provided. All of Taxpayer's retail transactions like this are "unitary" within the meaning of IC § 6-2.5-1-1(a). All the Taxpayer's unitary transactions involving tangible personal property which was used in Indiana (i.e. mailed to Indiana addresses) are subject to use tax.

Taxpayer has not met its burden to show that the Department's assessment of use tax on the purchase price of promotional materials is incorrect. Taxpayer's protest is respectfully denied.

### FINDING

Taxpayer's protest is respectfully denied.

## SUMMARY

Taxpayer's protest is sustained on Issue I regarding sales tax subject to a supplemental audit review of the additional exemption certificates provided. Taxpayer's protest is respectfully denied on Issue II regarding the proposed assessment of use tax on the purchase of promotional materials mailed to Indiana recipients.

*Posted: 08/27/2014 by Legislative Services Agency*

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